

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

STEVE GRAVENSTEIN

Claimant

VS.

CITY OF TOPEKA

Respondent

Self-Insured

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) Docket Nos. 239,090 & 241,877

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ORDER

Claimant requested Appeals Board review of Administrative Law Judge Bryce D. Benedict's August 12, 1999, Award. The Appeals Board heard oral argument in Topeka, Kansas, on December 15, 1999.

APPEARANCES

Claimant appeared by his attorney, Jan L. Fisher of Topeka, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Larry G. Karns of Topeka, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

At the request and agreement of the parties, these two docketed claims were consolidated for the purpose of litigation by the Administrative Law Judge's Order dated March 11, 1999. The first claim alleges a September 24, 1996, accident date. This claim was assigned Docket No. 239,090. The second claim alleges a date of accident as a series culminating on or about July 27, 1998. This claim was assigned Docket No. 241,877.

The Administrative Law Judge found claimant injured his low back as a result of a specific work-related accident on September 24, 1996. He also found claimant suffered further injury to his low back while performing his daily work activities culminating with a specific incident on July 27, 1998. But, instead of entering two separate Awards as

requested by the parties, the Administrative Law Judge found this was impractical and entered one award for a 16 percent permanent partial general disability. The Administrative Law Judge, however, did find two different accident dates and awarded claimant two allowances for unauthorized medical expenses.

On appeal, the claimant contends the Administrative Law Judge erred when he failed to enter two separate awards. Additionally, the claimant argues that the Administrative Law Judge erred when he failed to give any weight to Dr. Edward J. Prostin's opinion in regard to claimant's permanent functional impairment rating. After both accidents, respondent returned claimant to work earning 90 percent or more of his pre-injury average weekly wage. Accordingly, work disability is not an issue and claimant's entitlement to permanent partial general disability benefits should be based on his permanent functional impairment rating.¹

Conversely, the respondent requests the Appeals Board to affirm the Administrative Law Judge's Award. Respondent contends the 16 percent permanent functional impairment rating as determined by claimant's treating physician, Joseph G. Sankoorikal M.D., is the only credible medical opinion contained in the record. Furthermore, respondent argues the 16 percent functional impairment rating as found by Dr. Sankoorikal reflects claimant's total functional impairment for the September 24, 1996, accident. Respondent argues claimant failed to prove he sustained a separate compensable accident after the September 24, 1996, accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board makes the following findings and conclusions:

Did claimant suffer a second work-related injury while performing his daily work activities culminating with a specific incident at work on July 27, 1998?

Respondent does not dispute that claimant injured his low back on September 24, 1996, while pulling on cables connected to a winch as he was removing concrete covers from water meter boxes. Later in the work day, claimant started having pain in his low back that radiated down his right leg. The next day claimant could hardly walk. At that time, claimant notified his supervisor of his problems and was sent by respondent for treatment. First to a chiropractor and then to orthopedic surgeon Joseph W. Huston, M.D. Finally, claimant was referred to neurosurgeon John D. Ebeling, M.D.

¹ See K.S.A. 1996 Supp. 44-510e(a) for the September 27, 1996, accident and K.S.A. 1998 Supp. 44-510e(a) for the July 27, 1998, accident.

After Dr. Ebeling reviewed CT/myelogram examination findings, he recommended surgery for claimant's low-back condition and the radicular pain into his right leg. On December 17, 1996, Dr. Ebeling operated on claimant's low back. He performed bilateral L5 and L6 laminotomies and foraminotomies with left L5 and L6 discectomy. After the operation, claimant was relieved of the radicular symptoms. Dr. Ebeling first returned claimant to light work and then to regular work without restrictions in June of 1997.

After claimant returned to regular work, the bending and stooping required of the job eventually caused him to have low-back pain that again radiated down both legs. Because of these symptoms, Dr. Ebeling referred claimant to physical medicine physician Joseph G. Sankoorikal, M.D.

Dr. Sankoorikal first saw claimant on August 4, 1997, with complaints of residual back pain. He placed claimant in a physical therapy program for low-back conditioning plus he placed claimant on medication and provided him with education in reference his low-back condition. Claimant saw Dr. Sankoorikal on several occasions in August of 1997 but did not see him again until January of 1998. Claimant was then seen by Dr. Sankoorikal with frequent flare-ups of pain and discomfort in his back from his work activities over the next few months.

On July 27, 1998, claimant testified he experienced severe pain in his low back and down both legs when he was at work on his knees pushing shelving or scaffolding in the warehouse. This pain was worse than the pain he had previously experienced on a daily basis over the last few months. The respondent referred claimant back to Dr. Sankoorikal, and he saw claimant on July 31, 1998. Claimant was again placed in a physical therapy program and another MRI examination was ordered. Also, because claimant continued to be symptomatic, Dr. Sankoorikal placed permanent restrictions on his work activities. Basically Dr. Sankoorikal placed claimant in the light to sedentary work category and instructed claimant to avoid frequent stooping and bending activities. The last time Dr. Sankoorikal saw claimant was on February 5, 1999, for an impairment rating evaluation.

At claimant's attorney's request, orthopedic surgeon Edward J. Prostic, M.D., examined and evaluated claimant on October 13, 1998. Dr. Prostic's conclusions were that claimant sustained a low-back injury at work on September 24, 1996. That injury required a two level discectomy of claimant's low back. Claimant then returned to his regular work in June 1997, and claimant's work activities caused a permanent worsening of his low-back condition culminating in a specific incident that occurred at work on July 28, 1998.

Based on claimant's testimony and the medical opinions set forth by both Dr. Sankoorikal and Dr. Prostic, the Appeals Board concludes claimant has proved he sustained a low-back injury as a result of a specific September 24, 1996, work-related accident. Claimant was surgically treated for that injury and then eventually returned to his regular work duties in June 1997. Thereafter, claimant's work activities aggravated and

made his low-back condition worse through July 27, 1998, when he had a specific work-related incident. After the July 27, 1998, incident, Dr. Sankoorikal placed permanent work restrictions on claimant's work activities and claimant on February 22, 1999, transferred to a light work job of reservoir attendant. Accordingly, the Appeals Board concludes claimant sustained work-related low-back injuries on September 24, 1996, and July 27, 1998.

What is the nature and extent of claimant's disability for the September 24, 1996, and the July 27, 1998, work-related accidents?

As previously noted, work disability is not an issue in this case because respondent returned claimant to work after both accidents earning 90 percent or more of his pre-injury average weekly wage. Accordingly, claimant's entitlement to permanent partial disability benefits is based on claimant's permanent functional impairment as established by competent medical evidence and based on the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition (hereinafter referred to as *Guides*) if the impairment is contained therein.²

Both Dr. Sankoorikal and Dr. Prostic expressed opinions on claimant's permanent functional impairment as a result of the September 24, 1996, accident and the July 27, 1998, accident. Both doctors utilized the *Guides* in determining claimant's functional impairment rating. But the Administrative Law Judge found Dr. Prostic's permanent functional impairment ratings not reliable. He then adopted Dr. Sankoorikal's impairment rating of 16 percent for both accidents.

The Appeals Board disagrees with the Administrative Law Judge and finds that Dr. Prostic's functional impairment ratings should be given equal weight with the ratings of Dr. Sankoorikal.

The Administrative Law Judge rejected Dr. Prostic's functional impairment ratings because he found Dr. Prostic did not use an inclinometer to measure claimant's loss of range of motion, Dr. Prostic made, what the Administrative Law Judge considered, a ballpark guess when he apportioned the impairment ratings between the two accidents, and Dr. Prostic has, according to the Administrative Law Judge, an inclination to substitute his own personal method of determining functional impairment instead of following the *Guides*.

Both physicians determined that claimant's permanent functional impairment should be found by using the Range of Motion Model instead of the preferred Injury Model or Diagnosis-Related Estimates (DRE) Model in the *Guides*. Dr. Sankoorikal assessed claimant with a 10 percent permanent functional impairment for the first accident and a 7 percent permanent functional impairment as a result of the second accident. Using the

²See K.S.A. 1996 Supp. 44-510e(a) and K.S.A. 1998 Supp. 44-510e(a).

combined value charts, Dr. Sankoorikal combined those two impairments for a 16 percent permanent functional impairment for both accidents. Dr. Sankoorikal found both the 10 percent impairment rating and the 7 percent impairment rating using Table 75 Whole-person Impairment Percents Due to Specific Spinal Disorders (p. 113). The 10 percent impairment rating was found under the specific spinal disorder described in category II. E. "Surgically treated disk lesion with residual, medically documented pain and rigidity." The 7 percent impairment rating was found under the specific spinal disorder identified in category III. A. "Spondylolysis or grade I (1%-25% slippage); or grade II (26%-50% slippage) spondylolisthesis, accompanied by medically documented injury that is stable, and medically documented pain and rigidity with or without muscle spasm."

Dr. Sankoorikal found claimant had a grade I anterior subluxation of L4 on L5 after claimant's second accident. This was found by comparing the MRI examination results before claimant's first surgery with the MRI examination results after claimant second accident. Dr. Sankoorikal opined that the spondylolisthesis condition based on the MRI comparisons resulted from the second accident.

Dr. Prostin agreed that claimant had a 10 percent permanent functional impairment utilizing Table 75, category II. E. Because claimant had a surgery treated disc lesion at two levels, L5 and L6, Dr. Prostin added 1 percent to the 10 percent as directed by Table 75, category II. F. But Dr. Prostin testified that in addition to the diagnostic based component as found in Table 75, categories II. E. and II. F., the evaluator was required to combine range of motion impairment estimates and, in this case, the nervous system impairment estimates to arrive at claimant's total functional impairment rating. In support of his interpretation of the *Guides*, Dr. Prostin referred to the instructional section for Table 75 and specifically instruction number 2 which states as follows:

The diagnosis-based impairment estimates and percents shown above should be combined with range of motion impairment estimates and with whole-person impairment estimates involving sensation, weakness, and conditions of the musculoskeletal, nervous, or other organ systems.

Likewise, Dr. Prostin further supported his method of determining claimant's functional impairment by referring to Section 3.3j (p. 112), The Range of Motion Model, where the range of motion method of determining spine impairment is described as follows:

This approach uses a diagnosis-based component, based on Table 75 (p. 113), a method for determining the range of motion of the impaired spine region described in this section, and a component based on any spinal nerve deficit (Section 3.1k, p. 46).

Dr. Prostin also used Table 81 (p. 128) and Table 82 (p. 130) and determined claimant had a 9 percent functional impairment due to abnormal lumbosacral range of

motion. Additionally, the doctor utilized Table 83 and determined claimant had a 6 percent permanent functional impairment due to neurological deficits at L5 and S1.

In determining claimant's lumbar range of motion impairment, Dr. Prostic testified he did not use the two part inclinometer as recommended by the *Guides*. He found the range of motion deficit by utilizing his own method of measurement which he then interpolated into the abnormal lumbosacral impairment tables. The doctor also was asked, during his deposition testimony, if he had had an opportunity to look at the 25 percent whole body rating and apportion the rating between the September 24, 1996, accident and the July 27, 1998, accident. He indicated that he had an opportunity to make an apportionment and found that 16 percent should be attributed to the first accident and 9 percent was attributable to the second accident.

The *Guides*, Fourth Edition, emphasizes that impairment percentages arrived at by using the *Guides'* criteria represent estimates rather than precise determinations (p. v). Factors that go into estimating the degree of the patient's impairment are the physician's judgement, experience, training, skill, and the thoroughness in examining the patient and applying those findings to the *Guides'* criteria. Other considerations and variables also apply such as the interpretation of laboratory tests and clinical procedures (p. 3).

In conclusion, the Appeals Board finds that both of these physicians, under the circumstances and facts of this case, simply disagree as to the interpretation and application of the *Guides* in determining claimant's permanent functional impairment rating. Both physicians utilized the *Guides* in determining claimant's permanent functional impairment as required by statute. The Appeals Board finds that neither physician misapplied or misinterpreted the *Guides* to a point that their opinions should be disregarded. These two physicians simply disagreed not only as to the interpretation as to how the *Guides* should be applied in different circumstances but they also made different physical findings in regards to claimant's permanent condition as a result of his injuries.

Dr. Prostic has years of experience in treating patients' orthopedic problems and evaluating patients' permanent orthopedic problems for functional impairment ratings. The Appeals Board acknowledges that Dr. Prostic did not comply strictly with the *Guides'* recommendation to measure range of motion with an inclinometer. But Dr. Prostic did indicate that he used his own method of measurement and then interpolated those measurements into the abnormal lumbosacral range of motion measurements contained in the tables located in the *Guides*.

The Appeals Board, therefore, concludes that both testifying physician's functional impairment ratings should be given equal weight in determining the appropriate impairment of function for each date of accident. Accordingly, for claimant's September 24, 1996, accident date, the Appeals Board finds claimant has a 13 percent permanent impairment

of function and for the July 27, 1998, accident date the Appeals Board finds claimant has an additional 8 percent permanent impairment of function.

AWARD

Docket No. 239,090

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's August 12, 1999, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steve Gravenstein, and against the respondent, City of Topeka, a qualified self-insured, for an accidental injury which occurred September 24, 1996, and based upon an average weekly wage of \$519.69.

Claimant is entitled to 33 weeks of temporary total disability compensation at the rate of \$338 per week or \$11,154.00, followed by 51.61 weeks of permanent partial disability compensation at the rate of \$338 per week or \$17,444.18 for a 13% permanent partial disability, making a total award of \$28,598.18, which is all due and owing claimant and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are order paid by the respondent.

The Appeals Board approves and adopts all other orders set forth in the Award.

Docket No. 241,877

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's August 12, 1999, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Steve Gravenstein, and against the respondent, City of Topeka, a qualified self-insured, for an accidental injury which occurred July 27, 1998, and based upon an average weekly wage of \$529.13.

Claimant is entitled to 6.87 weeks of temporary total disability compensation at the rate of \$352.77 per week or \$2,423.53, followed by 33.2 weeks of permanent partial disability compensation at the rate of \$352.77 per week or \$11,711.96 for an 8%

permanent partial disability, making a total award of \$14,135.49, which is all due and owing claimant and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are order paid by the respondent.

The Appeals Board approves and adopts all other orders set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jan L. Fisher, Topeka, KS
Larry G. Karns, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director